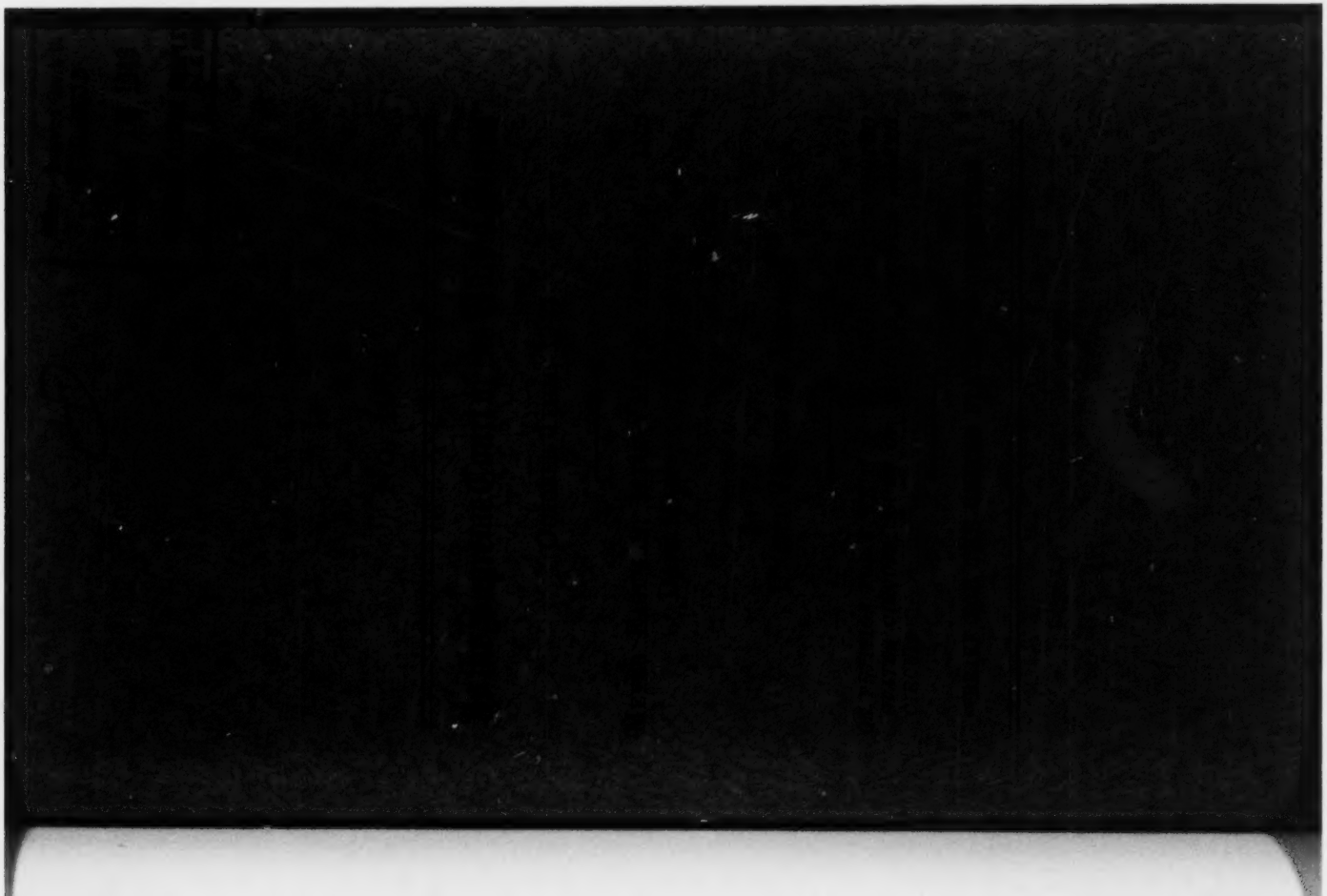

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1068

MEYER EASTMAN, ALIAS "MEYER ESSTMAN," AND DAVE MARGLOUS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 315–325, 353) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 16, 1946 (R. 325–326), and an order amending the opinion and denying a motion for rehearing (R. 327–351) was entered March 4, 1946 (R. 353). The petition for a writ of certiorari was filed April 6, 1946. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether evidence that petitioners, without having obtained a basic permit as required by Section 3 (c) (1) of the Federal Alcohol Administration Act, made numerous purchases and resales of large quantities of distilled spirits to two persons shown to be trade buyers and to several others who could not be located, and that petitioners were admittedly indifferent to the character of the businesses carried on by their customers and to the use that such customers made of the distilled spirits involved, was sufficient to support the verdict of the jury that (a) petitioners were engaged in the business of purchasing distilled spirits for "resale at wholesale,"[1] and (b) petitioners acted with such intent as the statute requires.

2. Whether the trial judge's charge to the jury was an adequate statement of the law and the issues involved.

3. Whether the applicable provisions of the Federal Alcohol Administration Act and the regulations promulgated thereunder are so vague, in-

[1] The regulations promulgated by the Federal Alcohol Administration define the term "resale at wholesale" to mean "a sale to any trade buyer," *infra*, p. 20.

definite, and uncertain as to render them legally ineffective.

4. Whether the prohibition in the Act against engaging in the business of purchasing distilled spirits for resale at wholesale without a basic permit applies to businesses exclusively intrastate in character.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Federal Alcohol Administration Act, the regulations promulgated thereunder by the Federal Alcohol Administration, and the Internal Revenue Code are set forth in the Appendix, *infra*, pp. 19–20.

STATEMENT

Petitioners and one Hendin were jointly indicted in the District Court for the Eastern District of Missouri. The first thirteen counts of the indictment charged that they knowingly and wilfully made false entries in certain records kept and filed by them pursuant to regulations promulgated by the Secretary of the Treasury under Section 2857 (a) of the Internal Revenue Code, and the fourteenth count alleged that they unlawfully, wilfully, and knowingly engaged in the business of purchasing distilled spirits for resale at wholesale without having the basic permit required by Section 3 (c) (1) of the Federal Alcohol Administration Act (*infra*, pp. 19–20). (R. 15–36.) The court directed a verdict of acquittal as to all the de-

fendants on the first thirteen counts, but they were found guilty on the fourteenth (R. 48–49). Petitioner Eastman was fined $1,000 plus costs, and petitioner Marglous and Hendin were fined $1,000 each (R. 49–53). On appeal to the Circuit Court of Appeals for the Eighth Circuit, petitioners' convictions were affirmed, but Hendin's was reversed (R. 325).

The evidence for the Government, which was not contradicted, shows the following:

During the period involved here, petitioners owned and operated a liquor establishment in St. Louis, Missouri, under the name "Peoples Liquor Store" (R. 62; Gov. Ex. 9, R. 241, 243; Gov. Ex. 10, R. 241, 245). They had purchased the tax stamp required by Section 3250 (a) (3) of the Internal Revenue Code (*infra*, p. 20) of retailers who in a single transaction sell in quantities of five wine gallons or more (R. 63, 241). Petitioners had not, however, applied for or acquired the basic permit required by Section 3 (c) (1) of the Federal Alcohol Administration Act without which they could not lawfully engage in the business of buying liquor for resale at wholesale (R. 114, 126, 136, 150).

While a large portion of petitioners' business may have been at retail in small quantities, the evidence showed that petitioners made at least thirteen sales of liquor in five different months of 1943 in amounts ranging up to 152

cases [2] in a single sale.[3] Of the thirteen sales, ten were to persons who could not be found at the addresses given in petitioners' reports or in the neighborhoods and who were unknown in the communities.[4] One of these ten persons, Meyer Marcus, was ultimately located elsewhere and at the

[2] On the average, 1 case of liquor equals 3 wine gallons (see, e. g., Gov. Ex. 1, R. 93, 65).

[3] Reports filed by petitioners with the Alcohol Tax Unit of the Treasury Department showed the following large sales by petitioners:

April 27, 1943—25 cases of whiskey to Joe Kratz, 1410 Lemay Ferry Rd., Lemay, Mo.;

April 28, 1943—15 cases of whiskey to Joe Goettleib, 1410 Lemay Ferry Rd., Lemay, Mo. (Gov. Ex. 1, R. 93, 65);

May 10, 1943—21 cases of whiskey to Joe Goettleib, 3033 LaSalle, St. Louis, Mo.;

May 12, 1943—20 cases of whiskey to Meyer Marcus, 4064 Lindell, St. Louis, Mo.;

May 19, 1943—5 cases of whiskey to J. W. Deans, Ozark, Mo. (Gov. Ex. 2, R. 95, 69);

June 5, 1943—100 cases of whiskey to Robert Mitchell, 2902 Dickson, St. Louis, Mo.;

June 7, 1943—100 cases of whiskey to P. H. Clark, Joplin, Mo.;

June 15, 1943—75 cases of gin to Fred Clayton, 2016 Main St., Kansas City, Mo. (Gov. Ex. 3A, R. 97–98, 75);

July 6, 1943—145 cases of whiskey and 25 cases of gin to Henry Clark, Monett, Mo.;

July 6, 1943—65 cases of whiskey and 10 cases of gin to Henry Leach, Van Buren, Mo.;

July 7, 1943—12 cases of whiskey to Fannie Gladdish, 2020 Cole, St. Louis, Mo. (Gov. Ex. 4A, R. 102, 104, 83);

November 11, 1943—152 cases of whiskey to George Hoerstfield, Eureka, Mo.;

November 12, 1943—60 cases of whiskey to Henry Jameson, Potosi, Mo. (Gov. Ex. 5, R. 107, 87).

[4] Joe Kratz, R. 119–121, 129; Joe Goettleib, R. 120–122, 129–130, 160–161; Meyer Marcus, R. 122, 130–131; J. W.

trial he denied that he had made the purchase of 20 cases attributed to him by petitioners (see note 3, p. 5, *supra*), although he admitted he had on several occasions purchased a couple of pints at petitioners' place of business (R. 152–153). Of the remaining three purchasers, one, Robert Mitchell, testified to the same effect as Marcus (R. 167–173). The other two purchasers, Fannie Gladish and P. H. Carlisle, confirmed the sales listed to them. Gladish received 12 cases on July 7, 1943, for resale at a tavern operated under license to, and managed by, her but which she stated was owned by another (R. 193–203; Gov. Ex. 7, R. 204, 205). Carlisle testified that he operated[5] a tavern at Joplin, Missouri, and had gone with one Sanders to petitioners' store on June 7, 1943, and that by pre-arrangement Sanders at that time bought 100 cases for him (R. 219–235.)[6]

Contrary to petitioners' claim that "there was no evidence offered by the Government to show

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Deans, R. 131, 162–163, 165–167; Fred Clayton, R. 176–177, 182–184; Henry Clark, R. 132; Henry Leach, R. 122–123, 132–133, 189–193; George Hoerstfield, R. 123–124, 133; Henry Jameson, R. 124–125, 133, 215–218.

[5] Carlisle was not asked whether he operated this tavern as of the time of the purchase in question, but since he was not cross-examined on this matter, the jury could have inferred that he meant he operated the tavern at that time (cf. Pet. 4).

[6] Carlisle testified that he gave the name P. H. Clark to Sanders (R. 234), and the sale was so listed in petitioners' report (Gov. Ex. 3A, R. 97–98, 75).

the fact that, or the time when, petitioners purchased any distilled spirits at their store for any purpose" (Pet. 5; see also pp. 7, 23), reports filed by petitioners with the Alcohol Tax Unit [7] showed as to six of the eleven large sales described in footnote 3, p. 5, *supra,* that petitioners had purchased and received the liquor involved on the same day or but a few days prior to resale by them.[8]

ARGUMENT

1. Petitioners' principal contention is that there was insufficient evidence to warrant the jury in

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[7] These reports, required by regulations of the Secretary of the Treasury promulgated under Section 2857 (a) of the Internal Revenue Code were of three types, only two of which are relevant to the instant discussion: Form 52B, the monthly report of liquor dispositions, and Form 52A, the monthly report of liquor received. The Government introduced in evidence Form 52B filed by petitioners for the months of April, May, June, July, and November 1943. However, Form 52A for only the months of June and July 1943 were introduced. Both forms gave, as required, the names of the purchasers (52B) or sellers (52A), the dates of disposition (52B) or receipt (52A), and the serial numbers of the cases involved.

[8] These purchases and sales by petitioner were as follows:

Number of cases	Date received	Date sold	Purchaser
100	June 5, 1943	June 5, 1943	Mitchell.
100	June 5, 1943	June 7, 1943	P. H. Clark.
75	June 13, 1943	June 15, 1943	Clayton.
(Gov. Ex. 3, R. 98, 73; Gov. Ex. 3A, R. 98, 75)			
28	July 6, 1943	July 6, 1943	Henry Clark.
73	July 6, 1943	July 6, 1943	Leach.
12	July 7, 1943	July 7, 1943	Gladish.
(Gov. Ex. 4, R. 102-103, 81; Gov. Ex. 4A, R. 104, 83)			

finding (a) that they were engaged in the business of purchasing liquor for resale at wholesale,[9] or (b) that they had any criminal intent.

(a) Petitioners argue, first, that Section 3 (c) (1) of the Federal Alcohol Administration Act (*infra*, p. 20) applies only to the business of purchasing for resale at wholesale and that there was no evidence as to purchases by them (Pet. 7–8, 13, 17, 23); and, second, that they could not be said to be "engaged in [such] business" on the basis of the proof adduced (Pet. 8, 11–12, 25–26).

First. As pointed out in the Statement, *supra*, p. 7, the Government introduced unequivocal evidence—reports made to the Treasury Department by petitioners themselves—showing that in at least six instances petitioners had purchased liquor later illegally resold at wholesale, and, moreover, that these purchases were consummated on the same, or a few days immediately preceding, the days on which the illegal resales were made. The only question open on the issue of purchase by the petitioners was whether those purchases were made as part of a business to resell at wholesale. On this question, we believe the circuit court of appeals correctly held that (R. 320–321):

> While the statute prohibits a liquor dealer who is not the holder of a basic

[9] "Resale at wholesale" is defined in regulations promulgated under the Federal Alcohol Administration Act as "a sale to any trade buyer" (*infra*, p. 20).

> permit from engaging in the business of purchasing liquor for resale at wholesale, proof that such a dealer is engaged in selling liquor to trade buyers is evidence that the liquor sold was purchased by him for that purpose. Such a dealer can hardly be heard to say that, while he sells liquor for resale [*sic*] at wholesale, he buys his liquor only for retail purposes. The character of his business, both as to the selling and buying of liquor, must necessarily depend upon the persons to whom he sells and the purpose for which they buy the liquor from him. Any different conclusion would virtually nullify the effectiveness of the statute.

The speciousness of petitioners' argument is further emphasized by the coincidence in time of many of the purchases and resales.

Second. While the foregoing discussion partially answers the argument of the petitioners that they were not "engaged in the business" charged, they urge (Pet. 11–12) that there was proof of only one sale to a trade buyer (Gladdish) and that such proof is insufficient to warrant a conclusion that they were "engaged in the business" of reselling to trade buyers, citing *Supreme Malt Products Co.* v. *United States,* 153 F. 2d 5 (C. A. A. 1). In that case, however, there was proof of only one isolated sale and no proof of corroborating circumstances supporting the conclusion that the defendant was engaged in a

course of business of purchasing for resale to trade buyers. In the instant case, on the other hand, there was proof of an additional sale to a trade buyer, Carlisle, and evidence of a number of sales in large quantities to persons who could not be traced through petitioners' records of such sales. There was also evidence of sales to two persons, Marcus and Mitchell, who denied that they had made any such purchases (see pp. 5–6, *supra*). In addition, there was evidence that petitioners were completely indifferent to the purposes for which their customers purchased liquor in the large quantities shown in their reports (R. 125; see note 10, p. 12, *infra*). It is settled, as the *Supreme Malt Products* decision recognizes (see 153 F. 2d at 6–7), that even a single sale, if thus corroborated, will support a conviction of engaging in a prohibited business without having paid the special tax or having secured a basic permit. See also *Wilson* v. *United States,* 149 F. 2d 780, 781 (C. C. A. 6), certiorari denied October 15, 1945, No. 345 at the present Term, and cases cited.

(b) In connection with their claim that there was insufficient evidence of intent to sell at wholesale or, as wholesale is defined in the regulations under the Act, to trade buyers, petitioners assert that the circuit court of appeals imposed an improper and indefinite test of responsibility by holding, in effect, "that such knowledge and inten-

tion were proved by the fact that petitioners made sale in quantities 'in excess of normal individual consumption requirements' " (Pet. 21).

The issue as to intent might well have been resolved, as suggested by the circuit court of appeals (R. 321), by reference to the principle applicable under regulatory statutes such as the one involved here (Section 7 of the Act, *infra*, p. 20), defining misdemeanors *malum prohibition* and not *malum in se*, that "the law imputes intent from the doing of the act denounced." *Armour Packing Co.* v. *United States*, 209 U. S. 56, 85–86; *United States* v. *Balint*, 258 U. S. 250, 251–252; *United States* v. *Gallant*, 177 Fed. 281 (W. D. Mich.). Under such statutes the conventional requirements for criminal intent are dispensed with and a duty of circumspection to avoid violation is imposed upon persons standing in a responsible position in relation to the public interest protected by the statute. *United States* v. *Dotterweich*, 320 U. S. 277, 281; *United States* v. *Balint*, *supra*, at 253–254.

However, petitioners have had the benefit of a more liberal rule, since their intent to resell to trade buyers was affirmatively established, and it is unnecessary to rely on any theory of constructive intent. Petitioners in fact sold to two persons who were trade buyers; they made numerous other sales of large quantities in excess of normal individual consumption requirements; they admittedly made no attempt to ascertain the intentions or occu-

pations of their large scale customers; and, in general, they evidenced complete and irresponsible indifference to whether their customers were trade buyers or whether they bought under their correct names and addresses.[10] From these cumulative facts, the jury could and apparently did find that petitioners wilfully violated the Act. The quantities of liquor involved in individual transactions were not the sole factor. Such sales should, however, have placed petitioners on notice that the purchasers might be buying for resale, thereby imposing upon them a duty to use reasonable diligence to ascertain the true identity and purposes of the buyers. Their indifference to this duty marks their conduct as wilful. *United States* v. *Thomson*, 12 Fed. 245, 248 (D. Ore.).

Petitioners also urge that no "regulation [has] been promulgated which requires a liquor dealer to sell at his peril or which imposes upon him a duty of investigating the business and purpose of his customer or the name and address furnished by such customer to him" (Pet. 21). Ap-

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[10] An investigator of the Alcohol Tax Unit testified without contradiction (R. 125):

"* * * I asked Mr. Eastman how—I first asked him if he knew these various customers and he said he knew some of them and some he didn't and I reminded him of his lack of a basic permit and asked him what steps he took to determine who they were or whether they were in the liquor business or not and he shrugged his shoulder and said 'I am no detective' and that he took the name and address they gave him but he made no attempt to find out anything about them."

parently petitioners believe that a liquor dealer can gain immunity from the regulatory features of the Act and avoid the necessity of securing a basic permit by merely shutting his eyes to the nature of the business carried on by those who deal with him. Certainly no such position can be maintained, in view of the design of the statute "to regulate the evils which are inseparable from unregulated and unrestricted traffic in intoxicating liquors, [by means of] the regulatory device of license or permits." *Arrow Distilleries* v. *Alexander,* 109 F. 2d 397, 401–402 (C. C. A. 7). The statute would be self-defeating if it did not implicitly require reasonable diligence on the part of unlicensed liquor dealers to avoid selling to trade buyers. And therefore a calculated failure, such as petitioners', to exercise that diligence where circumstances require it, is tantamount to wilful disregard of the statutory requirements.

2. Petitioners claim (Pet. 9, 14–15, 28–30) that the trial judge's charge permitted the jury erroneously to find petitioners guilty without regard to their intent, cf. p. 11, *supra.* The trial judge first read to the jury the statutory provisions which petitioners were charged with violating (R. 264–265), and then read the substance of count 14, including that part charging wilfulness (R. 265). The judge then stated that the "issue boiled down" to the question whether peti-

tioners sold at wholesale for resale purposes (R. 266), but followed this with clear instructions that the burden of proof was on the Government (R. 266) and that petitioners were entitled to acquittal if there was reasonable doubt of their guilt (R. 266). He then properly charged the jury with respect to the meaning of the words "wilfully" and "knowingly" as employed in the indictment (R. 267–268).[11]

Petitioners' contention is predicated upon isolated consideration of that part of the charge in which the judge stated that the issue, "boiled down," was whether petitioners sold at wholesale for resale. Such piecemeal consideration of a court's instructions to the jury is unwarranted. See, e. g., *Boyd* v. *United States,* 271 U. S. 104, 107; *Martin* v. *United States,* 100 F. 2d 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Hargreaves* v. *United States,* 75 F. 2d 68, 73 (C. C. A. 9), certiorari denied, 295 U. S. 759. In clear terms, both before and after the portion of the charge which petitioners now argue is objectionable, the court instructed the jury correctly on the elements of intent.

It is therefore evident that the entire charge gave the jury an accurate statement of the ap-

[11] The judge defined these two words as follows (R. 267–268):

"The word 'knowingly', gentlemen, as used in the indictment, means that state of mind where the defendant was in possession of facts from which he knew, or was aware that he could not legally do the act whereof he stands charged.

" 'Wilfully' means intentionally, and not accidentally."

plicable law. But even if there were some doubt as to this, petitioners are precluded from raising the question now, since they made no specific objection when the charge was given. After the trial judge had finished instructing the jury, counsel for petitioners took a general exception to the charge on the ground that it did not correctly state the law. When asked by the court whether there was "anything further," counsel replied in the negative. (R. 268.) It is well settled that it is incumbent upon counsel to direct the attention of the court to the particular portions of the charge to which objection is made so as to give the court opportunity for correction, and that an exception which does not do so raises no question for review. See, e. g., *Holder* v. *United States,* 150 U. S. 91, 92; *Burns* v. *United States,* 274 U. S. 328, 336; *Du Vall* v. *United States,* 82 F. 2d 382, 383–384 (C. C. A. 9), certiorari denied, 298 U. S. 667. Certainly there is even more reason to follow this principle where, as here, the claimed error exists only by a distorted reading of the charge.

3. Petitioners claim that Section 3 (c) (1) of the Federal Alcohol Administration Act and the regulation thereunder defining "resale at wholesale" are invalidly vague, indefinite, and uncertain, in that they fail to forewarn sellers of the conduct for which they will be criminally liable. They cite *M. Kraus & Bros., Inc.* v. *United States,* No. 198,

decided by this Court March 25, 1946. The statute and regulation here involved are, however, far different from those in the *Kraus* case and are well within the requirements of that decision. Read together, they are specific and unambiguous; a liquor dealer cannot purchase for resale to trade buyers, a well understood class of persons, without a basic permit. Whether a person is a trade buyer is an ascertainable fact, and the mere possibility that in isolated instances the exercise of reasonable diligence to ascertain this fact may not be availing does not excuse the seller who deliberately refrains from a proper inquiry. The rule of strict construction of penal statutes does not require that a statute "be strained and distorted in order to exclude conduct clearly intended to be within its scope." *United States* v. *Raynor*, 302 U. S. 540, 552. The seller is not, therefore, as petitioners argue, in a hazardous position under the Act and regulation. The situation here is analogous to that arising under various state laws prohibiting certain businesses from serving or employing minors. In such instances it is generally held that, even where intent is essential to guilt under the particular statute, the offense is complete if the business operator should have known by the exercise of reasonable diligence that the customer or employee was a minor. See, *e. g.*, *Stern* v. *State*, 53 Ga. 229; *Justice* v. *Commonwealth*, 213 Ky. 617, 281 S. W. 803; *Overland Cotton Mill*

v. *People,* 32 Colo. 263, 75 P. 924; *Siegel* v. *People,* 106 Ill. 89.

4. Petitioners contend that Section 3 (c) (1) of the Act was not intended to apply to a business such as theirs, the operations of which are solely intrastate in character, and that to construe it as applying to them raises serious questions of constitutional power under the commerce clause (Pet. 24). The first contention is negated by both the stated purposes and the design of Section 3 (*infra,* pp. 19–20). Subsections (a), (b) (2), and (c) (2) in terms apply only to interstate or foreign commerce in distilled spirits. Subsections (b) (1) and (c) (1), the latter being that which petitioners are charged with violating, contain no such express limitations; and the contrasting language of these two groups of subsections obviously precludes any implication that the activities proscribed by the latter group are limited to transactions in interstate or foreign commerce. Petitioners' argument ignores the unequivocal language of the statute; and "where the words are plain there is no room for construction." *Osaka Shosen Line* v. *United States,* 300 U. S. 98, 101. Nor is there any question of the constitutionality of this subsection of the Act as so applied to intrastate business, since, as the introductory lines of the section expressly state, it was enacted not only effectively to regulate interstate and foreign commerce and to enforce

the twenty-first amendment, but also "to protect the revenue." Comparable regulatory measures, applicable without regard to whether the regulated activities are interstate or intrastate in character, have been upheld where, as here, they implement and bear a reasonable relation to the exercise of the taxing power. See *United States* v. *Doremus,* 249 U. S. 86.

CONCLUSION

The decision below is correct and no real conflict of decisions or important question is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1946.